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FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

AUDIT REFERRAL: 11-06
DATE REFERRED: September 30, 2011
DATE ACTIVATED: January 23, 2012

EXPIRATION OF SOL:
Earliest: August 27, 2013
Latest: November 4, 2013

SOURCE: Internally Generated

RESPONDENTS: United Association Political Education Committee
and William P. Hite, in his official capacity as
treasurer

**RELEVANT STATUTES
AND REGULATIONS:** 2 U.S.C. § 431(17)
2 U.S.C. § 434(b)(6)(B)(iii) and (g)
11 C.F.R. § 104.3(b)(3)(vii)
11 C.F.R. § 104.4(a), (b) and (c)
11 C.F.R. § 104.14(b)(1)

INTERNAL REPORTS CHECKED: Audit Documents
Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

The Audit Division referred this matter to the Office of General Counsel following the
Commission's approval of the Final Audit Report ("FAR") for the audit of the United
Association Political Education Committee ("UAPEC") for the period from January 1, 2007
through December 31, 2008. See 2 U.S.C. § 438(b). The FAR, approved by the Commission on

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September 1, 2011, contained a finding (Finding 2) that UAPEC failed to timely file 24- or 48-hour notices and properly disclose independent expenditures.¹

We recommend that the Commission open a Matter Under Review, find reason to believe that UAPEC and William P. Hite, in his official capacity as treasurer, violated 2 U.S.C. § 434(b)(6)(B)(iii) and (g), and 11 C.F.R. § 104.4(a), (b) and (c) by failing to timely file 24- or 48-hour notices and properly disclose independent expenditures, :

II. FACTUAL AND LEGAL ANALYSIS

A. Facts

UAPEC is a separate segregated fund of the United Association of Journeymen and Apprentices for the Plumbing and Pipefitting Industry of the United States and Canada and has been filing disclosure reports with the Commission since September 1976. On September 18, 2008, UAPEC filed its 2008 September Monthly Report, which disclosed a \$56,289 disbursement for billboards and signs on Schedule B (Itemized Disbursements). On October 8, 2008, the Reports Analysis Division ("RAD") sent UAPEC a Request for Additional Information ("RFAI") asking UAPEC whether the \$56,289 disbursement was for materials that contained express advocacy that should have been reported as either in-kind contributions or independent expenditures. In response, on January 8, 2009, UAPEC filed an Amended 2008 September Monthly Report disclosing the disbursement as an independent expenditure "in support of Barack Obama" on Schedule E (Itemized Independent Expenditures).

¹ The FAR is available on the Commission's website. See *Audit Report – United Association Political Education Committee-2008*, http://www.fec.gov/audits/2008/United_Association_Political_Education_Committee/FinalAuditReportoftheCommission1186335.pdf.

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From September 2 through December 3, 2008, UAPEC made seven additional disbursements for mini-billboards, yard signs, posters, shirts, and hats "in support of Barack Obama for the 2008 General Election." As detailed in the table below, each of these disbursements was itemized as an independent expenditure on Schedule E of the respective report covering the date on which the invoice for the activity was paid. UAPEC did not file any corresponding 24- or 48-hour notices for these expenditures.

TABLE OF ITEMIZED INDEPENDENT EXPENDITURES

Disbursement	Amount	Invoice Date	Date Paid ¹	Report	Date Filed
Billboards, Signs, etc.	\$56,289.28	8/20/08	8/27/08	2008 Sept. Monthly (Schedule B); Amended 1/8/09 (Schedule E)	9/18/08
Mini-Billboards, Yard Signs	\$26,735.54	8/28/08	9/2/08	2008 Oct. Monthly (Schedule E)	10/20/08
Mini-Billboard, Signs	\$50,279.25	9/25/08	10/1/08	2008 12-Day Pre-General (Schedule E)	10/23/08
Lapel Pins	\$7,229.00	9/30/08	10/10/08	2008 12-Day Pre-General (Schedule E)	10/23/08
Billboards, Signs	\$31,704.75	10/6/08	10/27/08	2008 30-Day Post-General (Schedule E)	12/2/08
Signs	\$12,710.18	10/23/08	11/7/08 (11/3/08 on Sch. E)	2008 30-Day Post-General (Schedule E)	12/2/08
Signs	\$1,157.43	11/7/08	11/12/08	2008 30-Day Post-General (Schedule E)	12/2/08
Printing	\$324,208.99	10/31/08 and 11/18/08	12/3/08 (12/10/08 on Sch. E)	2008 Year-End (Schedule E)	1/26/09
TOTAL	\$510,314.42				

¹ The invoice date and date paid were obtained by Audit Staff from vendor invoices. The date paid is the same date as was reported on the Schedules E, except in the two instances noted above (see chart).

1 The Commission sent RFAs to UAPEC for each of these reports indicating that UAPEC
2 may have failed to file one or more of the required 24- or 48-hour notices for independent
3 expenditures. The RFAs noted that such expenditures must also be fully itemized on Schedule
4 E, or as memo entries on Schedule E and reflected on Schedule D (Debts and Obligations) of the
5 next report required to be filed by the committee, if distributed or disseminated prior to the
6 payment. On March 5, 2009, UAPEC responded to the RFAs by filing a single 48-hour notice
7 for the \$510,314.42 in independent expenditures previously disclosed on the Schedule Ee.

8 Pursuant to 2 U.S.C. § 438(b), the Commission subsequently authorized an audit of
9 UAPEC's activity for the period from January 1, 2007 through December 31, 2008. The Interim
10 Audit Report ("IAR") concluded, *inter alia*, that UAPEC did not properly report its independent
11 expenditures in two respects. First, the IAR concluded that UAPEC improperly disclosed
12 independent expenditures based on the date paid rather than the date disseminated.³ Second,
13 UAPEC failed to file corresponding 24- or 48-hour notices for any of these expenditures.
14 Although UAPEC failed to keep records showing the dissemination dates, based on the October
15 and November dates on most of the invoices, the auditors concluded that the materials were
16 likely disseminated within a timeframe that required 24- or 48-hour notices. *Id.*

17 The Audit staff recommended that UAPEC implement revised procedures to properly
18 disclose independent expenditures on Schedule E and/or D and to track aggregation and
19 dissemination for both the 24- and 48-hour notice requirements. *Id.* at 7. At the audit exit
20 conference, representatives of UAPEC stated that they understood the 24- and 48-hour
21 independent expenditure notice requirements, but were unsure how to determine a dissemination

³ For independent expenditures that were disseminated before they were paid for, UAPEC should have made disclosures as memo entries on Schedule E, and as a corresponding debt on Schedule D. *Id.*

1 date because the nature of the expenditures at issue – yard signs, mini-billboards, shirts, and hats
2 – made it difficult to ascertain precisely when the materials were publicly disseminated. IAR
3 at 6. UAPEC explained that these materials are not typically disseminated on the date the
4 material is received at the national union headquarters, but are generally sent directly to local
5 union members or to local unions for further distribution. *Id.* UAPEC represented that, going
6 forward, it would deem the date the material is received at its headquarters as the dissemination
7 date for reporting purposes. *Id.* In its subsequent written response to this IAR, UAPEC indicated
8 that it had developed new independent expenditure tracking procedures and provided a copy to
9 the Commission. See UAPEC Response to the IAR at 4 and Exhibit 3.

10 The Draft Final Audit Report (“DFAR”) also concluded that UAPEC did not properly
11 report its independent expenditures but noted that UAPEC had provided a copy of its new
12 procedures for reporting independent expenditures.

13 In response to the DFAR, UAPEC reiterated the arguments it made at the audit exit
14 conference. See UAPEC Response to the DFAR at 2. UAPEC also asserted that it did not
15 believe either the Act or Regulations provided guidance on when such materials should be
16 considered disseminated. *Id.* Finally, UAPEC argued that, because it is impossible to determine
17 a dissemination date for these types of materials, the Commission should take no further action
18 with respect to Audit’s Finding and Recommendation. *Id.* at 3.

19 On September 1, 2011, “the Commission approved a finding that UAPEC was required to
20 file 24- or 48-hour notices for independent expenditures based on the dissemination date rather
21 than payment date, and that UAPEC failed to keep a record of the dissemination date for the

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1 materials that were the result of the independent expenditures." The FAR concluded that
2 UAPEC may properly deem the date such materials are delivered to its headquarters as the
3 dissemination date for the purpose of filing 24- or 48-hour notices.⁵ FAR at 7.

4 On October 12, 2011, this Office notified the Respondents of the referral of Finding 2 of
5 the FAR to OGC for possible enforcement action in accordance with the Commission's policy
6 regarding notification in non-complaint generated matters. See 74 Fed. Reg. 38617 (August 4,
7 2009). UAPEC did not respond.

8 B. Legal Analysis

9 An independent expenditure is an expenditure that expressly advocates the election or
10 defeat of a clearly identified Federal candidate and is not made in concert or cooperation with, or
11 at the request or suggestion of, the candidate or his or her committee or agent. 2 U.S.C.
12 § 431(17). Under the Commission's regulations at 11 C.F.R. § 100.22(a), express advocacy
13 includes phrases such as "vote for the President" or "defeat" accompanied by a picture of one or
14 more candidates. It also includes material that contains campaign slogans or individual words,
15 "which in context can have no other reasonable meaning than to urge the election or defeat of
16 one or more clearly identified candidate(s)." *Id.*

17 Every political committee that makes independent expenditures must report those
18 expenditures in its regularly scheduled disclosure reports in accordance with 11 C.F.R.
19 § 104.3(b)(3)(vii); 11 C.F.R. § 104.4(a). Specifically, a political committee must disclose on
20 Schedule E the name of a person who receives any disbursement during the reporting period in

⁵ The Commission also indicated that it intended to provide guidance on when certain independent expenditures are deemed publicly disseminated for the purposes of the reporting requirements for independent expenditures. And on October 4, 2011, the Commission issued an Interpretive Rule addressing when independent expenditure communications taking the form of mini-billboards, yard signs, handbills, hats, buttons and similar items are considered "publicly disseminated" for reporting purposes. See *Interpretive Rule on When Certain Independent Expenditures Are "Publicly Disseminated" for Reporting Purposes*, 76 Fed. Reg. 61254 (Oct. 4, 2011).

1 an aggregate amount or value in excess of \$200 within the calendar year in connection with an
2 independent expenditure by the reporting committee. The report must disclose the date, amount,
3 and purpose of any such independent expenditure and include a statement that indicates whether
4 such independent expenditure is in support of or in opposition to a candidate, as well as the name
5 and office sought by such candidate. 2 U.S.C. § 434(b)(6)(B)(iii); 11 C.F.R. §§ 104.3(b)(3)(vii)
6 and 104.4(a). Independent expenditures of \$200 or less do not need to be itemized, though the
7 committee must report the total of those expenditures on line (b) of Schedule E. *Id.* Further, a
8 debt or obligation over \$500 shall be reported as of the date on which the debt or obligation is
9 incurred. 11 C.F.R. § 104.11(b). Independent expenditures made (*i.e.*, publicly disseminated)
10 prior to payment should be disclosed as memo entries on Schedule E and as reportable debt on
11 Schedule D. Committees are required to maintain records that provide information with
12 sufficient detail so that the reports may be verified. 11 C.F.R. § 104.14(b)(1).

13 Under certain circumstances, independent expenditures made by a political committee
14 require disclosure in addition to the committee's regularly scheduled disclosure reports. A
15 political committee that makes or contracts to make independent expenditures aggregating
16 \$10,000 or more in connection with a given election at any time during a calendar year up to and
17 including the 20th day before the date of an election is required to file a report describing the
18 expenditures within 48 hours. 2 U.S.C. § 434(g)(2); 11 C.F.R. § 104.4(b)(2). These reports,
19 known as 48-hour notices, must be filed by the end of the second day "following the date on
20 which a communication that constitutes an independent expenditure is publicly distributed or
21 otherwise publicly disseminated." 11 C.F.R. § 104.4(b)(2). A committee is required to file
22 additional reports within 48 hours after each time it makes or contracts to make independent
23 expenditures aggregating an additional \$10,000. *Id.*

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Further, a political committee that makes or contracts to make independent expenditures aggregating \$1,000 or more in connection with a given election after the 20th day but more than 24 hours before the date of an election is required to file a report describing the expenditures within 24 hours. 2 U.S.C. § 434(g)(1); 11 C.F.R. § 104.4(c). These reports, known as 24-hour notices, must be filed within 24 hours "following the date on which a communication that constitutes an independent expenditure is publicly distributed or otherwise publicly disseminated." 11 C.F.R. § 104.4(c). The committee must file additional reports within 24 hours after each time it makes or contracts to make independent expenditures aggregating an additional \$1,000. *Id.*

UAPEC failed to file one or more 24- or 48-hour independent expenditure notices for \$510,314 in independent expenditures it disclosed in its regularly filed disclosure reports. It appears that the materials at issue contained express advocacy and thus were required to be disclosed as independent expenditures. UAPEC began disclosing these disbursements as independent expenditures on Schedules E after receiving an RFAI indicating that if these materials contained express advocacy, they were to be disclosed as independent expenditures on Schedule E. UAPEC described these materials on its Schedule Es as billboards, yard signs, lapel pins, signs, and printing "in support of Barack Obama for the 2008 General Election," and documentation reviewed by the auditors includes vendor invoices for these materials in support of Obama or Obama/Biden, *see e.g.* note 2. Further, although UAPEC did not maintain records or keep track of its dissemination dates, the nature of the materials and the invoice dates indicate that these materials were likely disseminated shortly before the election. And UAPEC does not dispute that the materials were disseminated shortly before the election. Therefore, even if the precise dissemination dates cannot be determined for purposes of determining if a 24-hour notice

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1 was required, UAPEC would have been required to file 48-hour notices for any independent
2 expenditures aggregating \$10,000 or more in calendar year 2008 up to and including the 20th day
3 before the election.⁶

4 UAPEC also failed to properly disclose its independent expenditures on its Schedule Es,
5 in two respects: first, by reporting the expenditures on the date paid rather than on the dates the
6 materials were publicly disseminated; and second, with regard to those materials that were
7 disseminated before they were paid, by failing to disclose the expenditures as memo entries on
8 Schedule E and as a corresponding debt on Schedule D.

9 Based on the foregoing, we recommend that the Commission find reason to believe that
10 UAPEC violated 2 U.S.C. § 434(b)(6)(B)(iii) and (g), and 11 C.F.R. § 104.4(a), (b) and (c) by
11 failing to timely file 24- or 48-hour notices and properly disclose independent expenditures,
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⁶ In addition to the reporting errors, the FAR states that the Commission approved a finding that UAPEC "failed to keep a record of the dissemination date for the materials that were the result of the independent expenditures." FAR at 3. Pursuant to 11 C.F.R. § 104.14(b)(1), each political committee required to file any report or statement under this subchapter shall maintain records with respect to the matter required to be reported, which shall provide in sufficient detail the necessary information and data from which the filed reports and statements may be verified, explained, clarified, and checked for accuracy and completeness. Although UAPEC acknowledges its failure to keep proper records, this violation was not part of the referral. Therefore, consistent with prior matters, *see e.g.* MUR 6555 (Freedom's Defense Fund), this Office does not recommend pursuing this violation. *Cf.* MUR 6524 (Biden for President, Inc.) (recordkeeping violation referred and pursued).

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IV. RECOMMENDATIONS

1. Open a MUR;
2. Find reason to believe that the United Association Political Education Committee and William P. Hite, in his official capacity as treasurer, violated 2 U.S.C. § 434(b)(6)(B)(iii) and (g), and 11 C.F.R. § 104.4(a), (b) and (c).
3. Approve the attached Factual and Legal Analysis;
- 4.
- 5.
6. Approve the appropriate letter.

Anthony Herman
General Counsel

Daniel A. Petalas
Associate General Counsel for Enforcement

5-11-12
Date

BY:

Kathleen M. Guith
Kathleen M. Guith
Deputy Associate General Counsel
for Enforcement

Peter G. Blumberg
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Assistant General Counsel

Dominique Dillenseger
Dominique Dillenseger
Attorney

Attachments:

1. Audit Referral

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September 30, 2011

MEMORANDUM

To: Anthony Herman
General Counsel

AUDIT REFERRAL # 11-06

Through: Alec Palmer
Staff Director

From: Patricia Carmona
Chief Compliance Officer

Debbie Chacona

Thomas Hintzen
Acting Assistant Staff Director
Audit Division

Thomas Hintzen
Deputy Assistant Staff
Director for Public
Finance

Thomas Nurthen
Audit Manager

Thomas A.
Nurthen, Audit
Manager

By: Mary Moss
Lead Auditor

Digitally signed
by Mary E. Moss
Date: 2011.09.30
19:42:56 -0400

Subject: United Association Political Education Committee (A09-27)-
Referral Matter

On September 1, 2011 the Commission approved the final audit report on the United Association Political Education Committee (UAPEC). The final audit report includes the following matter that is referable:

Finding 2 – Failure to Timely File Notices and Properly Disclose Independent Expenditures

All work papers and related documentation are available for review in the Audit Division. Should you have any questions regarding this matter, please contact Mary Moss or Thomas Nurthen at 694-1200.

Attachment: Finding 2 – Failure to Timely File Notices and Properly Disclose Independent Expenditures

cc: Lorenzo Holloway

ATTACHMENT 1
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Finding 2. Failure to Timely File Notices and Properly Disclose Independent Expenditures

Summary

UAPEC disclosed independent expenditures, totaling \$510,314, on Schedule E (Itemized Independent Expenditures). The independent expenditures were reported when paid, which in most cases was after the time of the election. UAPEC should have disclosed these independent expenditures as memo entries on Schedule E and a corresponding debt on Schedule D. Finally, UAPEC failed to timely file any corresponding 24 or 48-hour notices. UAPEC agreed with the Audit staff's conclusion and, as recommended, provided a written copy of its new procedures.

The Commission approved a finding that UAPEC was required to file 24 or 48-hour notices for independent expenditures based on the dissemination date rather than payment date, and that UAPEC failed to keep a record of the dissemination date for the materials that were the result of the independent expenditures. UAPEC may consider the date such materials are delivered to its headquarters as the dissemination date for the purpose of filing 24 or 48-hour notices.

Legal Standard

A. Definition of Independent Expenditures. The term "independent expenditure" means an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in coordination with any candidate or authorized committee or agent of a candidate. 11 CFR §100.16(a).

B. Disclosure Requirements - General Guidelines. An independent expenditure shall be reported on Schedule E if, when added to other independent expenditures made to the same agency during the same calendar year, it exceeds \$200. Independent expenditures made (i.e., publicly disseminated) prior to payment should be disclosed as "memo" entries on Schedule E and as a reportable debt on Schedule D. Independent expenditures of \$200 or less do not need to be itemized, though the committee must report the total of those expenditures on line (b) on Schedule E. 11 CFR §§104.3(b)(3)(vii), 104.4(a) and 104.11.

C. Last-Minute Independent Expenditure Reports (24-Hour Notices). Any independent expenditures aggregating \$1,000 or more, with respect to any given election, and made after the 26th day but more than 24 hours before the day of an election must be reported and the report must be received by the Commission within 24 hours after the expenditure is made. A 24-hour notice is required for each additional \$1,000 that aggregates. The 24-hour notice must be filed on a Schedule E. The date that a communication is publicly disseminated serves as the date that the Committee must use to determine whether the total amount of independent expenditures has, in the aggregate, reached or exceeded the threshold reporting amount of \$1,000. 11 CFR §§104.4(f) and 104.5(g)(2).

D. Last-Minute Independent Expenditure Reports (48-Hour Notices). Any independent expenditure aggregating \$10,000 or more with respect to any given election, at any time during a calendar year, up to and including the 20th day before an election, must disclose this activity within 48 hours each time that the expenditures aggregate \$10,000 or more. The notices must be filed with the Commission within 48 hours after the expenditure is made. 11 CFR §§104.4(f) and 104.5(g)(1).

Facts and Analysis

A. Facts

Between August 27, 2008 and December 3, 2008, UAPEC made 8 disbursements totaling \$510,314 for the purchase of materials such as mini-billboards, yard signs, posters, shirts, hats, etc. These disbursements were itemized on Schedules E, in support of Barack Obama, filed with the report covering the period in which the payments were made. A majority of the independent expenditures were related to one payment, in the amount of \$324,209, that was paid after the 2008 General election.¹ UAPEC should have disclosed these independent expenditures as memo entries on Schedules E, filed with reports covering the dates when the materials were disseminated, and included a corresponding debt on Schedule D (Debts and Obligations).

Further, UAPEC did not timely file any 24 or 48-hour notices of its independent expenditures and did not maintain documentation of the dissemination date for any of the materials. However, the invoices were dated either October 31, 2008 or November 18, 2008. Therefore, it appears likely that the materials were disseminated within a notice period.

B. Interim Audit Report & Audit Division Recommendation

This matter was discussed with the UAPEC representatives during the exit conference. In response, Counsel stated that as a result of the audit, UAPEC's staff now understands the reporting requirements for independent expenditures, including 24 and 48-hour notices, and, the need to document dissemination dates. However, they were unsure how the dissemination date would be determined since UAPEC generally distributes materials directly to local union members or ships the materials to local unions for distribution. Counsel suggested that in the future, UAPEC will change its method of recording, aggregating and filing the required notices based on the date that materials are first received at UAPEC headquarters. This date would be UAPEC's dissemination date for 24 and 48-hour notices.

The Audit staff recommended that UAPEC implement revised procedures in order to properly disclose independent expenditures on Schedule's E and/or D and to track aggregation and dissemination for both the 24 and 48-hour notice requirements.

¹ UAPEC received a refund of \$38,710 relative to this payment.

C. Committee Response to Interim Audit Report

In response, UAPEC agreed with the Audit staff's conclusion and, as recommended, provided a written copy of its new independent expenditure tracking procedures.

D. Draft Final Audit Report

In the Draft Final Audit Report, the Audit staff acknowledged that UAPEC provided a copy of its new procedures for tracking independent expenditures.

E. Committee Response to Draft Final Audit Report

In response, UAPEC stated, that although it understood the 24-hour and 48-hour independent expenditure notice requirement, it did not believe that the Act or Regulations provided any guidance on when materials such as yard signs, mini-billboards, shirts, hats, etc., should be considered disseminated. Therefore, although it planned on implementing its new revised procedures, it requested a clarification concerning the precise date when the 24 and 48-hour notices should have been filed.

Commission Conclusion

On June 15, 2011, the Commission considered the Audit Division Recommendation Memorandum, in which the Audit Division recommended that the Commission adopt a finding that UAPEC was required to file 24 or 48-hour notices for independent expenditures based on the dissemination date rather than payment date, and that UAPEC failed to keep a record of the dissemination date for the materials that were the result of the independent expenditures. UAPEC may consider the date such materials are delivered to its headquarters as the dissemination date for the purpose of filing 24 or 48-hour notices.

The Commission approved the Audit staff's recommendation. The Commission intends to consider these issues with respect to independent expenditure reporting and make a public statement regarding these issues.